(1)

Supreme Court, U.S.
FILED

98 1501 MAR 18 1999

OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1998

THE CONLON GROUP, INC.,

Petitioner,

v.

THE CITY OF ST. LOUIS,

Respondent,

On Petition for Writ of Certiorari
to the
Supreme Court of the State of Missouri

PETITION FOR WRIT OF CERTIORARI

Daniel P. Finney, Jr.
1015 Locust St., Ste. 820
St. Louis, MO 63101

Michael A. Gross
15 North Gore
St. Louis, MO 63119

Attorneys for Petitioner

Nancie G. Marzulla*
DEFENDERS OF
PROPERTY RIGHTS
1350 Connecticut Ave, NW
Suite 410
Washington, DC 20036
(202) 822-6770

*Counsel of Record

4788

QUESTION PRESENTED

Whether a city can require a waiver of the right to just compensation guaranteed by the Fifth Amendment to the United States Constitution as a condition of obtaining development approval?

PARTIES TO THE ACTION

Petitioner, The Conlon Group, Inc., is a Missouri corporation in good standing and the owner of all interests, legal and equitable, in the building commonly known as the Syndicate Trust/Century Building, located in the City of St. Louis, Missouri. Pursuant to Rule 29.6 of this Court, petitioner declares that it has no parent companies or any wholly owned subsidiaries. Petitioner was plaintiff in the trial court, the Missouri Circuit Court, Twenty-Second Judicial Circuit, and appellee in the Missouri Court of Appeals, Eastern District, Division Five. Respondent, the City of St. Louis, was defendant in the trial court and appellant in the court of appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

PARTIES TO THE PROCEEDING..... iii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW..... 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS
AND STATUTES INVOLVED 3

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT..... 9

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Armstrong v. United States, 364 U.S. 40, 49 (1960).....14

AT&T Techs, Inc. v. Communications Workers,
475 U.S. 643 (1986) 12

Chicago B. & Q.R.R. v. Chicago,
166 U.S. 226 (1897).....10

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,
95 F.3d 1422 (9th Cir. 1996)..... 13

Commodity Futures Trading Comm'n v. Schor,
478 U.S. 833 (1986).....11, 12

Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967).....13

D.H. Overmyer Co. Inc. of Ohio v. Frick Co.,
405 U.S. 174 (1972).....12

Dolan v. City of Tigard, 512 U.S. 374 (1994).... 13, 16, 17

Kirby Forest Indus., Inc. v. United States,
467 U.S. 1, 14 (1984).....15

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992)..... 9, 10, 15

Penn Central Transp. Co. v. New York City,
438 U.S. 124 (1978).....14, 16

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393, 422 (1922).....15, 16

Perry v. Sindermann, 408 U.S. 593 (1972).....13

TABLE OF AUTHORITIES – Continued

Snepp v. United States, 444 U.S. 507 (1980).....12

Town of Newton v. Rumery, 480 U.S. 386 (1987)..... 11

Village of Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926).....16

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155, 164 (1980).....16

Constitutional Provisions

U.S. CONST. amend. V.....passim

U.S. CONST. amend. XIV..... 12

Mo. CONST. art. I, § 26..... 9

Other Authorities

Tim Kaine, *Capital Punishment and the Waiver of Sentence Review*, 18 HARV. C.R.–C.L. L.REV.
483, 495-96 (1983) 11

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

THE CONLON GROUP, INC., PETITIONER

v.

THE CITY OF ST. LOUIS, RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri

---

PETITION FOR WRIT OF CERTIORARI

Petitioner, The Conlon Group, Inc., respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Missouri in this case.

OPINIONS AND ORDERS BELOW

The decision of the Supreme Court of Missouri, denying petitioner's application to transfer, dated December 22, 1998 (App., *infra*, 1a) is unreported. The opinion of the

Missouri Court of Appeals, Eastern District, rendered on October 26, 1998, denying Petitioner's motion for rehearing and/or transfer to Supreme Court, is unreported. (App., *infra*, 2a) The initial decision of the Missouri Court of Appeals, Eastern District, Division Five (App., *infra*, 3a - 10a), was rendered on September 1, 1998, and is reported at 980 S.W. 2d 37 (Mo.App. E.D. 1998). The Findings of Fact, Conclusions of Law, Order and Judgment of the Missouri Circuit Court, Twenty-Second Judicial Circuit, Division Four (App., *infra*, 11a – 24a) dated December 22, 1997, is unreported.

JURISDICTION

The court of appeals entered its initial judgment and decision on September 1, 1998. The court of appeals denied a motion for rehearing on October 26, 1998. The Supreme Court of Missouri denied petitioner's application for transfer from the Missouri Court of Appeals, Eastern District, on December 22, 1998. (App., *infra*, 1a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

Article I, Section 26 of the Missouri Constitution provides that "private property shall not be taken or damaged for pubic use without just compensation." Mo. CONST. art. I, § 26.

STATEMENT OF THE CASE

1(a). This case arises out of the refusal of the Heritage and Urban Design Commission, an agent of respondent, City of

St. Louis, to approve a permit to demolish the Syndicate Trust/Century Building ("Building")[1] owned by petitioner, even though the building in question has not been designated as historic. (App., *infra*, 12a) Without a demolition permit, all beneficial and productive use of the building is foreclosed.[2] In May 1993, when petitioner acquired the Syndicate Trust/Century Building ("Building"), which is located in downtown St. Louis, Missouri, nothing prohibited demolition of the Building. (App., *infra*, 12a)

Shortly after purchasing the Building, petitioner hired an architect and developed a renovation plan that included renovating the first five floors into an interior parking garage and leasing the floors above the fifth floor as office space. (App., *infra*, 13a) In September 1993, petitioner completed the city's approval process for the redevelopment plan and

---

[1] The Syndicate Trust Building and the Century Building occupies an entire block in downtown St. Louis, Missouri. The Syndicate Trust Building is 100 years old and the Century Building is 70 years old. They were joined together in the 1940's and have been operated as one building ever since.

[2] The trial court found that "there is no economically viable use for the property unless the Building is demolished." (App., *infra*, 17a)

the city enacted Ordinance No. 63073, which approved the project.[3] In March 1994, petitioner executed the required redevelopment agreement with the Land Clearance for Redevelopment Authority ("LCRA"). This redevelopment agreement provided in relevant part that there could be "no substantial modification to the plan without aldermanic approval." (App., *infra*, 14a)

(b) Having obtained redevelopment approval, petitioner commenced Phase I of the project in November 1994. During the second week of the work, the front wheels of a "bobcat" carrying debris fell partially through the floor on the Century side of the Building. Following this incident, the

---

[3] The approval process consists of the following: "The developer/alderman requests that the area be blighted, and develops a plan for the property. This redevelopment plan is reviewed and approved by the LCRA. A draft of the plan is sent to the alderman for the area where the property is located. An ordinance which includes eminent domain is drafted by the LCRA for introduction to the Board of Alderman; the ordinance must be passed before any redevelopment can be done. After an ordinance is approved, the LCRA advertises for developers, prepares a developer's kit outline City requirements, and the developer subsequently enters into a development agreement with the LCRA." (App., *infra*, 13a-14a) In this case, the owner of the property and the developer were one and the same, so once the redevelopment ordinance is promulgated and agreement entered into, the project could proceed.

general contractor refused to do anymore work on that side of the Building. Petitioner hired a structural engineer who performed a structural analysis of the building and concluded that there was a serious problem with the integrity of the concrete slab on the Century side of the Building and that a "gut" renovation and other structural changes to the Building were necessary. (App., *infra*,15a)

The costs of the gut renovation and the other required structural changes rendered the project, as originally proposed, economically infeasible.[4] The nature and extent of the structural problems could only have been determined after extensive internal demolition was undertaken. (App., *infra*, 15a) Accordingly, the LCRA Board, with whom

---

[4] According to respondent's own financial analyses, construction and operation of the building in accordance with the original redevelopment plan is not economically feasible. The cost of rehabilitating the Building for office space and the parking garage is $30 million and if completed would result in annual operating losses for at least ten years. "[The city] calculates the financial loss year by year for ten years, demonstrating that such an investment would still lose $2.4 million in Year 10. Losses for Years 2-9 were as follows: Year 2: $9 million; Year 3: $4 million; Year 4: $3.2 million; Year 5: $2.8 million; Year 6: $2.9 million; Year 7: $2.1 million; Year 8: $2.2 million; Year 9: $2.3 million." (App., *infra*, 16a)

petitioner had signed the original redevelopment agreement, agreed to amend the redevelopment plan and prepared a resolution to that effect for approval by the Board of Alderman. The amended plan, like any plan to make the property economically viable, would allow demolition of the Building. The LCRA Board adopted the Resolution on March 23, 1995. (App., *infra,* 16a)

2. To commence the amended redevelopment plan, petitioner applied for the required demolition permit from respondent. The City's Heritage and Urban Design Commission ("HUDC"), the agency with the ultimate authority to grant demolition permits in the City, twice denied petitioner's permit application in July 1995 and August 1997. Petitioner twice appealed the HUDC decision to no avail, and on September 10, 1996, filed the instant action for inverse condemnation, alleging that the denial of the demolition permit constituted a taking of private property in violation of the United States Constitution and the Missouri Constitution. (App., *infra*, 17a)

The trial court found that "[t]here is no market for the property, by redevelopment or sale, without demolishing the Building. Left standing, this site cannot be economically utilized for office, residential or hotel use." (App., *infra*, 17a) The trial court further found, and there was no contrary evidence presented at trial, that "there is no economically viable use for the property unless the Building is demolished." (App., *infra*,17a) Thus, the trial court concluded that "[t]he denial of the demolition permit prevents any economically viable use of the property and therefore constitutes a total and permanent taking" and awarded $4,259,387.00 to petitioner as just compensation. (App., *infra*,17a, 23a)

The court of appeals reversed the trial court's judgment, holding instead that "[w]hen Conlon Group entered into the Redevelopment Agreement, it voluntarily gave up full control of its property rights."[5] (App., *infra*, 9a)

---

[5] The court of appeals erroneously stated that petitioner had "received benefits in the form of a tax abatement" from the agreement. (App., *infra*,

The court of appeals further held that "the rights and duties of the parties are governed by contract law, not by the takings clause of the Missouri Constitution. Therefore, we reverse the trial court's judgment." (App., *infra,* 10a) On October 26, 1998, the Court of Appeals denied petitioner's motion for rehearing, and on December 22, 1998, the Supreme Court of Missouri denied petitioner's motion for transfer of the case.

REASONS FOR GRANTING THE WRIT

In 1992, this Court held that a regulation which deprives property of all economically beneficial or productive use is a taking, for which just compensation is required by the Fifth Amendment. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).[6] But for a single fact – the determination that petitioner had waived its constitutional right to just compensation – this case would

---

7a) In point of fact, those tax benefits would accrue only after the project was developed, and accordingly petitioner has received no tax benefits from the agreement.

[6] "We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the

fall squarely within the *Lucas* rule, and petitioner would prevail. U.S. CONST. amend. V.[7] Indeed, that was the holding of the trial court: "[t]he denial of the demolition permit prevents any economically viable use of the property and therefore constitutes a total and permanent taking."[8] (App., *infra*, 17a) The open question – and the issue worthy of review by this Court – is whether that right to just compensation secured by the Fifth Amendment (the only express money damages remedy in the Constitution) can be waived, allowing the property to be taken for public use without just compensation.

This Court has held that, under appropriate circumstances, constitutional rights may be waived:

> "'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law." In both criminal and civil settings,

---

common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019 (emphasis in the original).

[7] The Fifth Amendment is applied to the states by the Fourteenth Amendment. *Chicago B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

[8] Had the South Carolina Coastal Council required Mr. Lucas, as part of its building permit application process, to sign a waiver of his rights to just compensation, would this Court have denied his claim for just compensation under the Fifth Amendment?

> courts apply the notion of waiver to preclude a party from asserting legal arguments and a wide range or rights and privileges because of his past action or inaction. Not surprisingly, the breadth of the concept's application ensures that its content is elusive. Recent commentators have frequently noted the disorderly nature of the doctrine of waiver and have sought to explain and harmonize the case law in different ways. . . . At the same time, the commentators' admission of disharmony in the concept's application serves to acknowledge that the definition of *what constitutes a waiver is intimately linked to the actual scope of the underlying rights themselves.*

Tim Kaine, *Capital Punishment and the Waiver of Sentence Review*, 18 HARV. C.R.–C.L. L.REV. 483, 495-96 (1983) (emphasis added) (citations omitted).

This Court has typically upheld waivers when the rights are procedural in nature. *See, e.g., Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833 (1986) (Article III's guarantee of an impartial and independent adjudication is subject to waiver just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried); *Town of Newton v. Rumery*, 480 U.S.

386 (1987) (right to sue waived through release agreements in exchange for dismissal of criminal charges); *D.H. Overmyer Co. Inc. of Ohio v. Frick Co.*, 405 U.S. 174 (1972) (14th Amendment due process rights to notice and hearing prior to civil judgment are subject to waiver). Likewise, waiver of constitutional rights have been upheld when to do so would further a compelling public interest. *See, e.g., Snepp v. United States*, 444 U.S. 507 (1980) (per curiam) (waiver of First Amendment rights to speak about government secrets by government employee in confidentiality agreement valid); *AT&T Techs, Inc., v. Communications Workers*, 475 U.S. 643 (1986) (right to jury trial waived by contract agreement to submit disputes to arbitration valid).

However, this Court has also held that other constitutional protections are non-waivable or waivable only in very narrow and highly compelling circumstances. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (Separation principles inherent in Article III are

not subject to waiver or consent because such principles serve institutional interests); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) (waiver of valued freedom of speech and press rights allowed only if need is clear and compelling).

So far as petitioner has been able to ascertain, this Court has never before addressed the issue of whether the constitutional right to just compensation can be waived or, if it can be, under what circumstances. The waivability of the Fifth Amendment right to just compensation is an issue of broad importance to millions of property owners across this country. Should the holding of the court of appeals remain intact, local government will have every incentive to require the automatic waiver of the just compensation right as a matter of routine in the permitting process, destroying all constitutional protection against the expropriation of private property for public use. Since property owners must routinely seek city approvals in the form of building permits *(Dolan v. City of Tigard*, 512 U.S. 374 (1994)), zoning ordinances (*City of Monterey v. Del Monte Dunes at*

Monterey, Ltd., 95 F.3d 1422 (9th Cir. 1996), *cert. granted*, 118 S.Ct. 1359 (Mar. 30, 1998) (No. 97-1235)), and architectural approvals (*Penn Central Transp. Co. v. New York City*, 438 U.S. 124 (1978)), it is a simple matter for those cities to condition these land use approvals on the waiver of constitutional rights to just compensation – as respondent did here.

It requires little imagination to envision wholesale waiver of the right to just compensation, eliminating by boilerplate waiver clauses this Fifth Amendment right. Indeed, it might fairly be said that any City Attorney who does not obtain Fifth Amendment waivers in connection with land use regulatory actions has been derelict in his or her duty to safeguard the city against Fifth Amendment liability.

Such a result flies in the face of the very purpose behind the Fifth Amendment which "[is] designed to bar Government from forcing some people alone to bear the burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S.

40, 49 (1960); *see also Kirby Forest Indus., Inc. v. United States,* 467 U.S. 1, 14 (1984) ("The principle that underlies this doctrine is that, while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of 'the advantage of living and doing business in a civilized community,' some are so substantial and unforeseeable, and can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole.") (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting)).

Certainly states may, in the legitimate exercise of their police power, restrict the uses of property, and property owners necessarily expect that their ownership rights must yield to this power; these are the "understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas*, 505 U.S. at 1027. This Court has repeatedly held that government has the right to regulate land

use through ordinance and permit schemes. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (land use regulations upheld as a legitimate use of police power); *Penn Central Transp. Co. v. New York City*, 438 U.S. 124 (1978) (government may engage in zoning or land use programs without necessarily violating the Just Compensation Clause). However, the Just Compensation Clause contained in the Fifth Amendment serves as a limitation upon the government's power to regulate land use: "the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Regulations clearly go too far when a state "by *ipse dixit*, . . . transform[s] private property into public property without compensation . . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court left no doubt that the government's ability to condition

the reasonable use of private property was also not unfettered:

> In *Nollan*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for public use – in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

512 U.S. at 385.

There is no doubt that under the present ordinances of the City of St. Louis governing use of this land, petitioner's property is worthless[9] and, but for the alleged waiver, the City's actions would entitle petitioner to just compensation. The only issue is whether the validity of that waiver can withstand constitutional scrutiny.

---

[9] Indeed, respondent has now initiated a condemnation action against petitioner to acquire the property which now has no fair market value as a result of the permit denial. *Land Clearance For Redevelopment Authority for the City of St. Louis v. The Conlon Group, Inc., et al.*, Cause

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Nancie G. Marzulla*
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave, NW, Suite 410
Washington, DC 20036
(202) 822-6770

*Counsel of Record

March 22, 1999

No. 99-200597, Filed March 5, 1999 in Missouri Circuit Court, Twenty-Second Judicial Circuit.

APPENDIX

IN THE SUPREME COURT OF MISSOURI

NO. 81233
E.D. Nos. 73789 and 73890

September Session, 1998

The Conlon Group, Inc.,

Respondent/Cross-Appellant,

vs. (TRANSFER)

The City of St. Louis,

Appellant/Cross-Respondent.

Now at this day, on consideration of respondent/cross-appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

White, J., not participating.

State of Missouri – Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 1998, and on the 22nd day of December, 1998, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 22nd day of December, 1998.
Thomas F. Simon (signature), Clerk

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: ATTORNEYS OF RECORD
FROM: LYNN COOPER HEARNES, CLERK
DATE: OCTOBER 26, 1998

RE: MOTIONS FOR REHEARING AND/OR TRANSFER TO SUPREME COURT DENIED

. . . . . .

10. 73789 The Conlon Group, Inc., Respondent v. The City of St. Louis, Appellant.

IN THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, DIVISION FIVE

The CONLON GROUP, INC., Respondent,
v.
The CITY OF ST. LOUIS, Appellant.
Nos. 73789, 73890.
Sept. 1, 1998.

[SUBSEQUENT HISTORY: Motion for Rehearing and/or Transfer to Supreme Court Denied Oct. 26, 1998. Application for Transfer Denied Dec. 22, 1998.]

ROBERT G. DOWD, Jr., Judge.

The Conlon Group, Inc., (Conlon Group) brought an inverse condemnation action against the City of St. Louis (City) after the Heritage and Urban Design Commission (HUDC) denied its request to demolish two buildings in the City of St. Louis. Thé circuit court found HUDC's denial of the demolition permit effectively deprived Conlon Group of any economically viable use of its property and awarded Conlon Group $4, 259,387. The City of St. Louis appeals claiming: 1) the trial court was precluded from determining the issue of economic viability by the doctrine of collateral estoppel; 2) the trial court erred in rendering judgment for Conlon Group on the inverse condemnation claim because Conlon Group had entered into a Redevelopment Agreement and under the terms of the agreement had no right to demolish the buildings; and 3) the trial court erred in the amount of damages awarded to Conlon Group. We reverse.

In May of 1993, Conlon Group purchased real property in the City of St. Louis commonly known as the Syndicate Trust and Century Buildings from the Federal Deposit Insurance Corporation (FDIC) for $625,000. The Century Building is approximately 100 years old, and the

Syndicate Trust Building is approximately 70 years old. Although they were built separately, the two buildings were essentially connected without an expansion joint and operated as one. Together, the buildings comprise an entire city block in downtown St. Louis. The City has not designated the buildings as a landmark or a historic site. Conlon Group financed the purchase of the buildings by borrowing approximately $500,000 from Southwest Bank. Conlon Group paid off the loan in approximately fourteen months.

Within a few months of purchasing the buildings, Conlon Group decided to renovate. The plan called for the conversion of the lower floors to indoor parking and the upper floors to office space for lease. Conlon Group approached the Land Clearance for Redevelopment Authority of the City of St. Louis (LCRA) and submitted the proposal. The LCRA approved the redevelopment plan and produced a blighting plan. The Board of Aldermen approved and incorporated the plans into Ordinance 63073 on December 22, 1993. On March 16, 1994, Conlon Group and LCRA entered into a written Redevelopment Agreement. The Redevelopment Agreement between Conlon Group and LCRA incorporated Ordinance 63073.

Section Fifteen of Ordinance 63073 provides in pertinent part that, "Where a proposed modification will substantially change the Plan, the modification must be approved by the St. Louis Board of Aldermen in the same manner as the Plan was first approved." Section Fourteen of Ordinance 63073 allowed Conlon Group to seek a ten-year tax abatement. Also, the LCRA agreed in Paragraph 7 of the Redevelopment Agreement to cooperate with Conlon Group and use its best efforts to assist Conlon Group in getting the maximum benefits of the tax abatement. Conlon Group further agreed to use the property pursuant to the provisions of the Plan, and be bound by the conditions and procedures set forth in the Redevelopment Agreement and in the Ordinance.

After both parties signed the Redevelopment Agreement, Conlon Group commenced with its plan to convert floors two through five from office space into parking. As a contractor performed interior demolition work, a part of the concrete floor collapsed under the weight of the equipment used to perform the demolition work. Conlon Group suspended work on the project to perform further research into the condition of the buildings. After obtaining some preliminary engineering analyses, the engineers discovered that the concrete strength and the capacity of the floor slabs in the buildings could not support the load of a parking garage. The structural defects necessitated a "gut" renovation. After considering the additional costs to remedy the structural deficiencies, which were estimated in the millions, Conlon Group decided to abort the original plan.

In the Spring of 1995, Conlon Group approached the St. Louis Development Corporation (SLDC) and LCRA to seek an amendment of its development plan and Redevelopment Agreement. Conlon Croup proposed to demolish the existing buildings and erect a new parking garage with retail space on the first floor. The only work that Conlon Group could immediately finance was the demolition and a surface lot. Conlon Group proposed an interim surface parking lot as a means of producing revenue. Conlon Group conceded that demolition of the Syndicate Trust and Century Buildings would constitute a substantial modification of the Redevelopment Agreement which had to be approved by the Board of Aldermen. Conlon Group obtained SLDC's recommendation and LCRA approval of the proposed amendment, and Board Bill 92 was introduced. The amendment was never approved by the Board of Aldermen.

Conlon Group then applied for a demolition permit application with the City. Under City Ordinance 61366, all applications must be approved by HUDC. Following a hearing, HUDC's Commissioner denied the application. Conlon Group then administratively appealed the denial to HUDC. The HUDC issued findings of fact and conclusions

of law and again denied the permit. Conlon Group appealed the HUDC decision to the Circuit Court of Cole County. The circuit court reversed the HUDC decision denying the permit. The City then appealed the circuit court decision to the Western District Court of Appeals. The Western District found the record insufficient and remanded the case to HUDC to make proper findings of fact and conclusions of law. *Conlon Group, Inc. v. City of St. Louis*, 944 S.W.2d 954, 958-59 (Mo.App. W.D. 1997). On remand, HUDC issued findings of fact and conclusions of law and again denied the demolition permit. Conlon Group did not appeal the HUDC's second decision. Instead, Conlon Group brought an inverse condemnation action based on Art. I, Sec. 26 of the Missouri Constitution.

We choose to address the City's second point on appeal because it is dispositive of the other issues. In its second point on appeal, the City asserts that the trial court erred in rendering judgment for Conlon Group on its claim of inverse condemnation. The City argues Conlon Group voluntarily entered into a Redevelopment Agreement with LCRA under which it agreed to rehabilitate the buildings and abide by the terms and conditions of the redevelopment ordinance which prohibited demolition without approval by the City of St. Louis Board of Aldermen. Conlon Group argues, on the other hand, that the redevelopment Agreement was not enforceable.

The judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo.banc 1976).

A redevelopment agreement is no different from any other contract, and it is measured by the same tests and subject to the same rights and liabilities. *Schweig v. Maryland Plaza Redevelopment Corporation*, 676 S.W.2d 249, 257 (Mo.App. E.D.1984). Redevelopment agreements, like other bilateral agreements, are presumed valid and

enforceable. Id. A redevelopment agreement constitutes a binding contract, with mutual obligations on the parties. Id.

Conlon Group voluntarily entered into the Redevelopment Agreement. Conlon Group received benefits in the form of a tax abatement and exclusive development rights, in exchange for its agreement to rehabilitate the buildings. At trial, the president of Conlon Group testified that one of the main reasons for entering into the agreement was to take advantage of the tax abatement. Conlon Group could have redeveloped the property without aid from the City and LCRA, but instead chose to pursue the tax abatement route. Since Conlon Group voluntarily entered into the agreement in order to obtain the benefits of such an agreement, it is bound by the terms of the agreement.

The City introduced the Redevelopment Agreement at trial and Conlon Group conceded that the modification was a substantial deviation from the original plan and such an amendment required the approval of the Board of Aldermen. The Board of Aldermen gave no such approval. However, Conlon Group argues that the approval by SLDC and LCRA was in effect approval from the City, since SLDC and LCRA are part of the City's municipal structure. We disagree.

A redevelopment authority requires local governing approval for all substantive exercise of its statutory powers. Mo. Rev. Stat. § 99.330(1) (1998); *Land Clearance for Redevelopment Authority of Kansas City, Mo. v. Waris*, 790 S.W.2d 454, 455 (Mo.1990). Section 99.330 provides in pertinent part:

> There is hereby created in each community (as herein defined) a public body corporate and politic, to be known as the "Land Clearance for Redevelopment Authority" of the community; provided, however:
> (1) That such authority shall not transact any business or exercise its powers hereunder until or unless the governing body shall approve (by

> resolution or ordinance as herein provided) the exercise in such community of the powers, functions and duties of an authority under this law.

A redevelopment authority is a subordinate body administering the details of a city's or county's redevelopment policy as expressly approved by the governing body. *Land Clearance for Redevelopment Authority for Kansas City, Mo. v. Waris*, 790 S.W.2d at 455. Conlon Group's negotiations with SLDC and LCRA, no matter how extensive, still required the approval of the Board of Aldermen. Moreover, the fact remains that the plain language of the Redevelopment Agreement required the approval of the Board of Aldermen for modifications that would substantially change the original plan. There was no language in the Redevelopment Agreement that authorized SLDC or LCRA to approve such a modification. Therefore, without approval from the Board of Aldermen, the Redevelopment Agreement prohibited demolition.

In response, Conlon Group argues that the Redevelopment Agreement was unenforceable because the development plan was no longer feasible due to "commercial frustration." "Commercial frustration" exists when an event unforeseen by the parties happens that is not caused by or under the control of either party and destroys or nearly destroys the value of the performance or the purpose of the contract. *Shop 'N Save Warehouse Foods, Inc. v. Soffer*, 918 S.W.2d 851, 863 (Mo.App. E.D. 1996). The doctrine of commercial frustration is meant to have limited application so as to preserve the certainty of the contracts. Id.

The doctrine of commercial frustration is inapplicable here. First, the structural defects were foreseeable in the 100-year-old building. The trial court found that Conlon Group could not have foreseen the nature and extent of the structural problems prior to the purchase by looking at the building plans and the FDIC information packet. However, Conlon

Group could have discovered such defects by investigating the structural soundness of the buildings prior to entering into the Redevelopment Agreement. Conlon Group purchased the buildings in "as is" condition, without performing any type of engineering, environmental, or marketing analysis. It then failed to conduct any extensive investigation of the structural soundness of the buildings before entering into the Redevelopment Agreement. Yet, Conlon Group's own structural engineer testified at trial that one of the first steps in the development process of a 100-year-old building should have been to conduct extensive tests and core tests to make sure the concrete slabs were suitable for the project.

Second, the purpose of the Redevelopment Agreement has not been destroyed. Although the expected costs of the redevelopment project have increased considerably, there was testimony that the original plan remains feasible. We find that the doctrine of commercial frustration is inapplicable, leaving a valid and enforceable agreement.

Since there was a valid and enforceable agreement between Conlon Group and LCRA, we find that the trial court erroneously applied the law of inverse condemnation in the present case. Mo. Const. Art. I, Sec. 26 provides that: "private property shall not be taken or damaged for public use without just compensation." Under this constitutional provision, to recover for a claim of inverse condemnation, a plaintiff must show the government appropriated "some valuable property right which the landowner has acquired by the legal and proper use of [its] land." *Ressel v. Scott County*, 927 S.W.2d 518, 520 (Mo.App. E.D. 1996). When Conlon Group entered into the Redevelopment Agreement, it voluntarily gave up full control of its property rights. *See State ex rel. Washington Ave. Redevelopment Corp. v. City of St. Louis*, 906 S.W.2d 808, 811 (Mo.App. E.D. 1995). Conlon Group agreed to abide by the terms of the Redevelopment Agreement, which limited its control of its property rights. These limits include a requirement that the

Board of Aldermen approve all substantial modifications. As such, the rights and duties of the parties are governed by contract law, not by the takings clause of the Missouri Constitution. Therefore, we reverse the trial court's judgment.

Because we hold that the language of the Redevelopment Agreement controls, we need not consider the other points on appeal. Our holding also renders respondent's cross-appeal, concerning prejudgment interest, moot.

Judgment reversed.

CRANDALL and AHRENS, JJ., concur.

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)

THE CONLON GROUP, INC., Plaintiff,	)
	) Cause No. 962-07977
vs.	)
	) Division No. 4
THE CITY OF ST. LOUIS, Defendant.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

On September 29, 1997, this cause came on before the Court on Plaintiff's First Amended Petition for Damages -- Inverse Condemnation, and Defendant's Second Motion for Summary Judgment. Plaintiff appeared by its president, Mark Finney, and its attorney, Daniel P. Finney, Jr. Defendant appeared by its attorneys, Michael A. Garvin and Stephen J. Kovac. The parties announced ready for trial, waived jury trial and adduced evidence. The parties filed a joint stipulation of facts, proposed findings of fact and conclusions of law and responses to the opposing party's proposals, and submitted the cause to the Court. Having considered the pleadings, exhibits, testimony, stipulation of facts, and arguments of counsel, the Court now enters its findings of fact, conclusions of law, order and judgment.

FINDINGS OF FACT

1. The Conlon Group, Inc. ("Plaintiff") is a Missouri corporation in good standing and the owner of all

interests, legal and equitable, in parcels of real estate comprised of City Block 273, bounded by Locust Street on the north, Olive Street on the south, Tenth Street on the west, and Ninth Street on the east in the City of St. Louis, Missouri, and on which the building commonly referred to as the Syndicate Trust/Century Building is located. The legal description of the real estate is set forth in plaintiff's First Amended Petition. It is this property which is the subject of the instant litigation.

2. Defendant, the City of St. Louis ("the City") is a constitutional charter city, organized and existing pursuant to the constitution and laws of Missouri, and having the power of eminent domain.

3. The Heritage and Urban Design Commission ("HUDC") is an agency of the City and acts on behalf of the City. Among its duties/responsibilities are to provide for designation of historic districts, landmarks and landmark sites, and to review demolition permit applications.

4. The Land Clearance for Redevelopment Authority of the City of St. Louis ("the LCRA") is a body politic and corporate, organized and existing pursuant to the laws of Missouri.

5. The Syndicate Trust Building and the Century Building were joined together in the 1940's and have been operating as one building since that time.

6. Neither building has been designated as an historical building, landmark or landmark site.

7. Plaintiff acquired the Syndicate Trust/Century Building ("the Building") from the Federal Deposit Insurance Corporation ("FDIC") in May, 1993 for $625,000.00. At the time of the purchase, nothing prohibited demolition of the Building.

8. An environmental site assessment conducted before plaintiff purchased the Building indicated that friable asbestos containing materials were likely present on all hot water pipes in the Building. Plaintiff was also provided with a copy of the building plan before the purchase.

9. When Plaintiff purchased the Building, there were 38 tenants generating about $2,169,153.00 per year in lease revenue. The principal tenant was Southwestern Bell, occupying 500,000 square feet, but expected to move out upon completion of the "Bell Tower". The income generated by the Southwestern Bell lease was sufficient to pay off plaintiff's purchase loan in 14 months.

10. The real estate industry designates office space by class, Class A being the highest and most desirable by location and condition, thus generating higher rental per square foot, and Class C being the lowest and least desirable. The Building's office space was designated as Class C. While the demand for Class B and C office space was very weak at the time Plaintiff purchased the Building, the demand for parking in downtown was high enough that an interior parking garage in an office building could increase occupancy and upgrade the status of an office building.

11. Plaintiff hired an architect, investigated the demand for downtown parking, and developed a plan which included renovating the first five floors into an interior parking garage and leasing the floors above the fifth floor as office space. The Court finds that under the terms of this original plan, at a cost of $2.7 million for Phase I (the interior parking garage), plaintiff would break even financially. Leased office space on floors six through ten would then be profitable.

12. To redevelop a property such as that involved in the case at bar, the following process must be followed: The developer/alderman requests that the area be blighted, and develops a plan for the property. This redevelopment plan is reviewed and approved by the LCRA. A draft of the plan is sent to the alderman for the area where the property is located. An ordinance which includes eminent domain is drafted by the LCRA for introduction to the Board of Alderman; the ordinance must be passed before any redevelopment can be done. After an ordinance is approved, the LCRA advertises for developers, prepares a developer's

kit outlining City requirements, and the developer subsequently enters into a development agreement with the LCRA.

13. Mark Finney, the president of plaintiff, completed the above-referenced process in September, 1993, including the passage of Ordinance No. 63073 and approval of the redevelopment plan. In March, 1994, Mark Finney executed the redevelopment agreement for the property, incorporating Ordinance No. 63073. The redevelopment agreement provided, in part, that there could be no substantial modification to the plan without aldermanic approval. Plaintiff concedes, and the Court finds, that demolition of the Building would constitute a substantial modification of the redevelopment plan.

14. In December, 1993, letters went out for Phase I predemolition work necessary for the architect and engineers to see the condition of the Building. Asbestos was removed from the third floor. The architectural and engineering drawings were completed in June, 1994. A construction loan in the amount of $2,700,000.00 was obtained from Southwest Bank for phase I of the reconstruction plan.

15. Phase I demolition began in November, 1994. During the second week of the work, the front wheels of a "bobcat" carrying debris fell partially through the floor on the Century side of the Building; following this incident, the general contractor refused to do any more work on that side of the Building. Plaintiff hired a structural engineer, Michael Falbe, to investigate the cause of the partial collapse of the floor and to perform a structural analysis of the Building.

16. Mr. Falbe's structural analysis included sending concrete core samples to a testing laboratory, reviewing the BOCA Code requirements with a City building official, and researching the history of the Building to determine what engineering work had been done over the years. The tested specimens of the concrete slab were well

below the BOCA code requirements. After Mr. Falbe completed his work, he wrote an engineering report in which he concluded that there was a serious problem with the integrity of the concrete slab in the Century side, necessitating a "gut" renovation of that portion of the Building.

17. An additional structural problem encompassing both sides of the Building, arising from a 1978 renovation to accommodate Southwestern Bell's leased space on floors 4, 5, 6, 7 and 10 was also discovered. Two inches of concrete fill was added to the original concrete slab; the weight of the concrete fill added fifteen to twenty-five pounds per square foot and significantly reduced the "live load" capacity on those floors. Under BOCA, which the City has adopted, commercial buildings must be able to bear a concentrated "live load" of 2,000 (i.e., 20 square inches must support 2,000 pounds of equipment and/or people). In addition to the other work, the concrete fill would have to be removed so the Building would meet BOCA code.

18. Additional Phase I costs necessary to remedy the structural deficiencies in the Century side of the Building were estimated at another $1.7 million (for the parking garage alone), and based on this additional cost plaintiff terminated the project. The preliminary numbers demonstrated that the project was no longer economically feasible.

19. The Court finds that the nature and extent of the structural problems could not have been determined prior to purchase by looking at the building plans and FDIC property information packet containing an asbestos analysis. The problems became apparent only after extensive internal demolition for Phase I of the project.

20. Mr. Finney took this new information and change in circumstances to the City and the agencies involved in the redevelopment process. He met separately with Larry Bushong (then General Counsel for the St. Louis Development Corporation), Dale Ruthsatz (Director of

Commercial Development for the LCRA), and Kathleen Shea (employed by the City as the HUDC Commissioner), regarding the feasibility of continuing with the project as originally planned.

21. Mr. Ruthsatz agreed that the original plan was not economically feasible, based on the new information learned about the Building's condition and the added costs involved in pursuing the original plan. He agreed to amend the plan, prepare a resolution and Board Bill 92 for submission to the Board of Aldermen, a necessary process for changing the original ordinance. The amended plan would allow demolition of the Building and construction of a surface parking lot initially, and a parking garage/retail space after two years. The Resolution was adopted by the LCRA Board on May 23, 1995. The Board Bill 92 was introduced on June 2, 1995 and public hearings were tentatively scheduled for June 28 or July 5, 1995.

22. Employees of the City prepared financial analyses which likewise demonstrated that the original redevelopment plan was not economically feasible. According to the City's own figures, the cost of rehabilitating the Building for office space and the parking garage is $30 million. The pro forma (Exh. 1), prepared by the City, shows operating losses every year. It calculates the financial loss year by year for ten years, demonstrating that such an investment would still lose $2.4 million in Year 10. Losses for Years 2-9 were as follows:
Year 2: $9 million; Year 3: $4 million; Year 4: $3.2 million; Year 5: $2.8 million; Year 6: $2.9 million; Year 7: $2.1 million; Year 8: $2.2 million; Year 9: $2.3 million.

23. Plaintiff filed a demolition permit application with the City. By City Ordinance, all applications must be approved by the City's Heritage and Urban Design Commission (HUDC). Following a hearing on June 28, 1995, the application was denied by Kathleen Shea, HUDC's Commissioner. Plaintiff then appealed this to HUDC which on August 18, 1995, likewise denied the permit and issued

findings of fact and conclusions of law. Plaintiff appealed the HUDC decision to the Circuit Court of Cole County, which reversed HUDC's decision on May 30, 1996. The City appealed the Cole County Circuit Court decision to the Western District Court of Appeals which remanded the case to HUDC due to the insufficiency of the record, findings of fact and conclusions of law. The instant inverse condemnation cause of action based on Art. I, Section 26 of the Constitution of Missouri, was filed on September 10, 1996, before the Court of Appeals, Western District rendered its decision on May 20, 1997. On August 7, 1997, following remand, HUDC issued its second findings of fact and conclusions of law, once again denying the request for a demolition permit. On August 20, 1997, the instant cause was assigned to Division 4 for trial. Plaintiff did not appeal HUDC's second decision.

24. There is no market for the property, by redevelopment or sale, without demolishing the Building. Left standing, this site cannot be economically utilized for office, residential or hotel use. Economically viable uses do exist for the property, however, if the Building is razed; those uses include a surface parking lot and/or parking garage. The financial analysis for the new garage construction shows a profit from Year 5 forward. For these reasons, the Court finds there is no economically viable use for the property unless the Building is demolished.

25. The denial of the demolition permit prevents any economically viable use of the property and therefore constitutes a total and permanent taking. The Court finds the date of taking is August 18, 1995, when HUDC denied Plaintiff a permit to demolish the Building. Having made this finding, the Court must assess a value for the property.

26. Before addressing the particular appraisals, another issue must be resolved. The City objected to Plaintiff's expert, Preston Bank, testifying regarding the property's value at any time other than in 1997. The City based its objections on Plaintiff's alleged failure to disclose

any opinion by this witness other than that given at deposition. Upon review of Exhibit HH (a portion of Mr. Bank's deposition), the Court notes that the attorney for the City asked the witness what his appraisal value was as of September 26, 1997; he was never asked whether he had an opinion as to the value of the subject property as of August, 1995. Inasmuch as Mr. Bank's appraisal in 1995 was the same as in 1997, the City cannot demonstrate any prejudice from the admission of this evidence.

27. The experts engaged by the parties came to conclusions so disparate it was difficult to believe they were appraising the same property. Plaintiff's expert testified that the property -value was $8,000,000.00, minus the cost of demolition and environmental abatement. The City's expert, James Tellatin, testified that the property cleared has a value of $1,000,000.00; this value is the same whether appraised in 1995 or 1997.

28. Several factors must be taken into consideration when assessing value. On one hand, the Building property encompasses an entire city block in the downtown area, affording the owner a greater number of options in terms of development and increasing its value; on the other hand, the property is located in the central business district, a depressed area of downtown, decreasing its value. There was credible testimony at trial indicating that if the demolition permit were granted in 1995, the property could have been considered a viable site for the Convention Center Hotel that is currently planned.

29. The Court finds that the Paul Brown Building, used by Mr. Tellatin, to be the best comparable sale property. Both the Building and the Paul Brown Building were built at roughly the same time (in the 1920's); the Paul Brown is in the central business district, within one city block of the Building; and the sale of the Paul Brown Building five years ago was not a "forced" sale. One of the significant differences is that the Paul Brown Building comprises one-half a city block, while the Building encompasses an entire

city block. For the purpose of assessing value, the Court finds that the size of the Building property offsets any of the Building's deficiencies.

30. Having considered the size of the property, its location and the experts' testimony, the Court finds the reasonable value of the property to be $96.77 per square foot. The land area is 61,583 square feet.

31. The parties stipulated and the Court finds that reasonable cost of demolition is $1,150,060.00.

32. Unlike the cost of demolition, the cost of environmental abatement was hotly contested. Plaintiff introduced an estimate made by William Milligan, the owner/operator of Cardinal Environmental. Mr. Milligan's company has considerable experience abating lead and asbestos in buildings for both the City of St. Louis and major corporations in the metropolitan area. He estimated the cost of abatement to be $450,000.00 to $550,000.00 in 1995. Thomas Helfrich, an engineer with a background in environmental engineering and hired by the City as an expert, estimated the cost of abating environmental problems in the Building to be $5.3 to $7.7 million.

33. The Court finds the testimony of plaintiff's expert witness, one who actually has hands-on experience abating asbestos and lead, and whose company in fact abated the asbestos from the third floor in the Building, to be more credible. The Court therefore finds the reasonable cost of environmental abatement to be $550,000.00.

34. The parties stipulated that subject to the terms, conditions and applications of the applicable statutes and ordinances, annual property taxes on commercial real estate in the City of St. Louis at the current tax rate can be determined by multiplying the fair market value of the property by 2.96 percent.

35. The Court takes judicial notice of the contents of its court file.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter. The City asserts, through a motion for summary judgment, that the Court lacks subject matter jurisdiction. The City premises its argument on the basis that Plaintiff did not appeal the decision of the Heritage and Urban Design Commission ("HUDC"), and thereby failed to exhaust administrative remedies.

Plaintiff's petition seeks relief in the form of inverse condemnation based on Art. I, Section 26 of the Missouri Constitution. In State ex rel. J. S. Alberici v. City of Fenton, 576 S.W.2d 574, 577 (Mo.App.E.D. 1979), a zoning case, the Court concluded that the only permissible exception to the exhaustion requirement in zoning matters appears to be where constitutional questions are raised. Faced with a challenge similar to the City's in the instant case, the Court of Appeals held:

> Finally, the state asserts that because appellant did not directly challenge the designation, administratively or through a declaratory judgment action for instance, appellant was properly dismissed out of court. Again, this court disagrees. The provision on which appellant's claim is based, Art. I., Sec. 26 of the Missouri Constitution, is self-enforcing and an action may be brought directly thereunder.

Harris v. Missouri Department of Conservation, 755 S.W.2d 726, 731 (Mo.App.W.D. 1988), citations omitted. The Court concludes that it has jurisdiction over the parties and subject matter hereof. It was not necessary for Plaintiff to challenge the HUDC denial of the demolition permit on August 18, 1995 either through administrative or judicial review in order to proceed under the above-referenced constitutional provision for inverse condemnation. Defendant's Second

Motion for Summary Judgment is therefore denied.

2. The Missouri Constitution provides: "...private property shall not be taken or damaged for public use without just compensation." Art. I, § 26, Mo.Const. Under this constitutional provision, to recover on a claim for inverse condemnation, plaintiff must show that the City appropriated, without formally condemning, some valuable property right which the landowner has acquired by legal and proper use of his land. Forty Mill Realty Venture v. State ex rel. Missouri Highway and Transportation Department, 872 S.W.2d 528 (Mo.App.E.D. 1994).

3. Plaintiff was forced to alter its original plan for the Building after discovering the extensive yet unforeseeable structural problems. The agencies involved with City redevelopment agreed that the original plan was economically infeasible. The financial analysis prepared by the City's employees also supported this conclusion. In reevaluating the original plan, both Plaintiff and the LCRA agreed that demolition was appropriate. An amended redevelopment plan and Board Bill 92, prepared by the LCRA, sought to effect a change in Ordinance No. 63073 to allow demolition. Despite these facts, the HUDC denied the demolition permit.

Where a person with an interest in real property is denied a permit to demolish a building because of its historical importance and is thus denied any economically viable use of the property, an inverse condemnation or taking action may be appropriate. Barket v. City of St. Louis, 903 S.W.2d 269, 271 (Mo.App.E.D. 1995), citations omitted. While the Building is not designated as an historical site, the Court sees no reason why the Barket holding should not apply: the City's refusal to issue a demolition permit deprives plaintiff of any economically viable use of its property. Plaintiff has sustained its burden of proof and established that his property has been appropriated, without being formally condemned.

4. The City argues that Plaintiff's proposed

demolition of the Buildings is not a "legal use" under the current ordinance. Plaintiff sought to have the ordinance changed to permit demolition; without an amendment to the Ordinance, demolition is not permissible. However, without a demolition permit, Plaintiff is deprived of any legal, economically viable use of its property. It is a "Catch-22" perpetuated by the City and its agencies, and the precise reason plaintiff brought this action in inverse condemnation. The argument is without merit.

5. Under Missouri law, the measure of damages in an inverse condemnation case is the fair market value of the property immediately before the taking. (M.A.I. 9.01) The definition of "fair market value" is the price the property would bring when offered by sale by one willing but not obligated to sell and when bought by one willing or desirous to purchase, but who is not compelled to do so. In determining fair market value, all uses of the property including the best use should be considered. (M.A.I. 16.02)

6. The Court has considered all of the expert testimony of comparable sales and the features of each site used by the experts in terms relative to the Building including: size, distance from the subject property, location in downtown (e.g., on a main thoroughfare or not), uses and circumstances under which the properties were sold. The Court concludes the total value of Plaintiff's property to be $96.77 per square foot cleared, for a gross sum of $5,959,387.00. The cost of demolition ($1,150,000.00) and the cost of environmental abatement ($550,000.00 as of the date of the taking), must be deducted. Therefore, the net value of the property is $4,259,387.00.

7. The Court is aware of no authority under Missouri law permitting the award of consequential damages or prejudgment interest where a total taking has occurred.

ORDER AND JUDGMENT

WHEREFORE, based on the foregoing it is

ORDERED, ADJUDGED and DECREED that judgment in inverse condemnation be and is hereby entered in favor of plaintiff and against Defendant; it is

FURTHER ORDERED that Plaintiff shall transfer all legal right, title and interest in the property known and described in plaintiff's First Amended Petition as follows:

PARCEL 1: A tract of land being all of BLOCK 273 of the City of St. Louis, Missouri, and described as follows: Beginning at a point on the Northern line of Olive Street, 60 feet wide, at its intersection with the Eastern line of Tenth Street 60 feet wide, said point being the Southwestern corner of Block 273; thence Northwardly along said Eastern street line, 228.48 feet to its intersection with the Southern line of Locust Street, 60 feet wide, said point being the Northwest corner of Block 273; then Eastwardly along said Southern street line, 270.17 feet to its intersection with the Western line of Ninth Street, 60 feet wide, said point being the Northeast corner of Block 273; thence Southwardly along the said Western street line, 228.40 to its intersection with the Northern street line 270.17 feet to the point of beginning. EXCEPTING THEREFROM that part front 21 feet 3 inches on the North line of Olive Street by a depth Northwardly of 75 feet, bounded on the West by East line of Tenth Street.

PARCEL 2: A LOT in BLOCK 273 of the City of St. Louis, fronting 21 feet 3 inches on the North line of Olive Street by a depth Northwardly of 75 feet, bounded on the West by East line of Tenth Street.

to the City of St. Louis, Missouri; it is

FURTHER ORDERED that Plaintiff shall recover from Defendant the sum of $4,259,387.00 (Four Million Two-Hundred Fifty-Nine Thousand Three-Hundred Eighty-Seven

Dollars). Costs taxed against Defendant.

SO ORDERED:
MARGARET M. NEILL, Judge

Dated: December 22, 1997

cc: Daniel P. Finney, Jr., 1015 Locust St., Suite 820, St. Louis, MO 63101, Attorney for plaintiff; Michael A. Garvin, 100 5. Fourth St., Suite 500, St. Louis, MO 63102, and Stephen J. Kovac, City Hall, Room 314, St. Louis, MO 63101, Attorneys for Defendant.

Supreme Court, U.S.
FILED
APR 15 1999
CLERK

No. 98-1501

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE CONLON GROUP, INC.,
Petitioner,

v.

THE CITY OF ST. LOUIS,
Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENT THE CITY OF ST. LOUIS

THOMAS J. RAY
City Counselor

EDWARD J. HANLON*
Deputy City Counselor

**Counsel of Record*

Office of the City Counselor for the
City of St. Louis
Room 314 City Hall
1200 Market Street
St. Louis, Missouri 63103
314-622-3361

Attorneys for Respondent

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

1288

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
I. The Petition Should Be Denied Because The Decision of the Missouri Court of Appeals, Eastern District, Does Not Involve Any Federal Issues, and Petitioner Failed to Raise Any Federal Issue Before the Missouri Court of Appeals, Eastern District, or the Missouri Supreme Court	4
II. The Petition Should Be Denied Because The Missouri Court of Appeals, Eastern District, Correctly Determined That Petitioner Voluntarily Relinquished Any Right to a Demolition Permit By Entering Into a Development Agreement Which Required That It Maintain The Buildings	5
CONCLUSION	6
APPENDIX	A-1

TABLE OF AUTHORITIES

Page

Cases

Adams v. Robertson, 520 U.S. 83 (1997) 4

Matson Navigation Company v. United States, 284 U.S. 352 (1932) 5

Webb v. Webb, 451 U.S. 493 (1981) 4

Yee v. Escondido, 503 U.S. 519 (1992) 4

Constitutional Provisions

United States Constitution, Amendment Five 4,5

Mo. Const. Article I, Section 26 3,4

Statutes and Rules

Sections 99.130 - 99.660 R.S.Mo. 2

Section 99.700 R.S.Mo. 2

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENT CITY OF ST. LOUIS

Respondent City of St. Louis respectfully requests that this Court deny the petition for writ of certiorari seeking review of a decision of the Missouri Supreme Court denying transfer of the case below from the Missouri Court of Appeals, Eastern District. That decision is reported at 980 S.W.2d 37 (Mo. App. E.D. 1998).

STATEMENT OF THE CASE

Petitioner Conlon Group filed the action below seeking damages for the alleged taking or damaging of its real property, commonly known as the Syndicate Trust and Century Buildings. In its First Amended Petition, plaintiff Conlon Group claimed that it applied on May 30, 1995, for a permit to demolish these structures, which application was denied on or about June 30, 1995. Plaintiff alleged that the City denied its application for a demolition permit for the stated purpose of maintaining architectural quality and urban design which constitute a public use. According to plaintiff, this action prevented effective use of its property and diminished the value of the property.

In its answer, defendant City alleged that Conlon Group was precluded from claiming any right to demolish the Syndicate Trust and Century Buildings because it had entered into a redevelopment agreement with the Land Clearance for Redevelopment Authority of the City of St. Louis, as authorized by Ordinance 63073, under which Conlon Group agreed to renovate the buildings.

Conlon Group purchased the Syndicate Trust and Century Buildings from the Federal Deposit Insurance Corporation ("FDIC") in May, 1993, at a cost of $625,000.00. Petition for Certiorari, Appendix, pp. 3a. Shortly after purchasing the

buildings, Conlon Group decided to renovate the property by converting the lower floors to parking and refurbishing the upper floors for office space. Id., p. 4a. Conlon Group submitted this plan to the Land Clearance for Redevelopment Authority of the City of St. Louis (LCRA), (Id.), a public body separate from the City of St. Louis which is authorized, when approved by ordinance, to operate urban renewal programs in specified areas. Sections 99.130-99.660 R.S.Mo. LCRA approved the plan submitted by Conlon Group and thereafter the City of St. Louis adopted Ordinance 63073 approving the plan and authorizing a redevelopment agreement, under which Conlon Group was entitled to the benefit of tax abatement.[1] (Id.) In Paragraph 7 of the agreement, which Conlon Group executed, Conlon Group agreed to use the property as set forth in the approved Plan. (Id.) The redevelopment agreement specifically incorporated all of the provisions of Ordinance 63073. (Id.) Section Fifteen of Ordinance 63073 provided in part that, "[w]here a proposed modification will substantially change the Plan, the modification must be approved by the St. Louis Board of Aldermen in the same manner as the Plan was first approved." (Id.)

Conlon Group began preliminary interior demolition work to prepare for construction of parking facilities, but encountered unexpected problems which caused the cost of the project to increase beyond that originally anticipated. Id., p. 5a. Conlon Group then abandoned its original rehabilitation effort and sought issuance of a demolition permit from the City, so that Conlon Group could demolish the buildings, build a surface parking lot, and possibly build a parking garage at some point in the future. (Id.) Conlon Group conceded that this constituted a substantial modification of its original development plan and agreement, which required approval of the City of St. Louis

---

[1] Tax abatement for such development projects is authorized by statute, Section 99.700 R.S.Mo.

Board of Aldermen. (Id.) Conlon Group never secured such approval. (Id.) The City of St. Louis denied Conlon Group's request for a demolition permit. (Id., pp. 5a-6a) Conlon Group then brought the action below seeking damages for a taking of its property by virtue of the denial of a demolition permit. (Id.)

The Circuit Court of the City of St. Louis held that plaintiff had established that a taking in violation of Article I, Section 26 of the Missouri Constitution had occurred, and awarded Conlon Group the sum of $4,259,387.00. (Id., pp. 23a-24a) The trial court rejected the City's contention that plaintiff was bound by the terms of Ordinance 63073 and the redevelopment agreement to rehabilitate the structures on the property rather than being entitled to demolish them.

On appeal, the Missouri Court of Appeals, Eastern District, reversed the circuit court's judgment, holding that Conlon Group was bound by the provisions of the redevelopment agreement and ordinance, which precluded it from demolishing the buildings. (Id., pp. 3a-10a).

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because The Decision of the Missouri Court of Appeals, Eastern District, Does Not Involve Any Federal Issue and Petitioner Failed to Raise Any Federal Issue Before the Missouri Court of Appeals, Eastern District, or the Missouri Supreme Court.

In its decision, the Missouri Court of Appeals, Eastern District, determined that the City of St. Louis' action in denying petitioner Conlon Group a demolition permit to demolish the Syndicate Trust/Century Buildings did not violate Conlon Group's right to just compensation under Article I, Section 26 of the Missouri Constitution. The trial court, in its decision, had found the contrary. Neither decision, that of the state circuit court or the Missouri Court of Appeals, Eastern District, even mentions the takings clause of the Fifth Amendment to the United States Constitution, much less bases its decision on that provision.

This Court has frequently declined to address federal constitutional issues that were not raised or decided in the state court from which a petition originates. See, e.g., Adams v. Robertson, 520 U.S. 83 (1997); Yee v. Escondido, 503 U.S. 519 (1992); Webb v. Webb, 451 U.S. 493 (1981). Here, the decision of the Missouri Court of Appeals, Eastern District, does not address the issue sought to be presented by petitioner. In such cases, this Court assumes that the issue was not properly presented to the state court and the petitioner bears the burden of demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here." Webb v. Webb, 451 U.S. at 501. Petitioner has failed to demonstrate how and where it ever presented a Fifth Amendment issue to the Missouri Court of Appeals, Eastern District, or to the Missouri Supreme Court in its application for transfer. See Appendix, infra, A-1 – A-3. Nor does the decision of the circuit court, from which the

underlying appeal originated, even mention the Fifth Amendment. Petition for Writ of Certiorari, Appendix, pp. 11a-24a.

This Court should deny the petition because petitioner failed to raise in the state court below the issue it seeks to present to this Court.

II. The Petition Should Be Denied Because The Missouri Court of Appeals, Eastern District, Correctly Determined That Petitioner Voluntarily Relinquished Any Right to a Demolition Permit By Entering Into a Development Agreement Which Required That It Maintain The Buildings.

In its decision, the Missouri Court of Appeals, Eastern District, held that the case was properly analyzed as a contract case, not a takings case, and that Conlon Group had no right to a demolition permit to demolish the buildings because it had voluntarily relinquished any such right by entering into the redevelopment agreement. Petition for Writ of Certiorari, Appendix, pp. 9a-10a. This holding raises no compelling reason to justify review or certiorari. See Supreme Court Rule 10.

Petitioner falsely attempts to portray the decision of the Missouri Court of Appeals, Eastern District, as holding that Conlon Group "waived" its right to just compensation by entering into a redevelopment agreement. That decision says no such thing. It holds only that Petitioner gave up any right it might otherwise have had to the issuance of a demolition permit by entering into the redevelopment agreement, which required it to maintain the existing structures, and which in turn provided Petitioner with the benefits of exclusive development rights and tax abatement.

Even if this was an instance of "waiver" of the constitutional right to just compensation, petitioner is simply wrong in its assertion that this court has never before addressed the issue. Peition for Writ of Certiorari, p. 13. See Matson Navigation

Company v. United States, 284 U.S. 352, 357-358 (1932), holding that ship owner could, by contract, waive its constitutional right to just compensation.

Stripped of constitutional verbiage, Conlon Group's argument is that it need comply with the terms of the contract it entered into only when it is financially advantageous to do so. According to Petitioner, once a party to a contract with government realizes that it will lose money by carrying out its duties under the contract, a taking has occurred. In short, Petitioner contends that a party that contracts with government is constitutionally guaranteed it will never lose money. This Court has never approved such a proposition. It should not do so in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Thomas J. Ray, City Counselor
Edward J. Hanlon, Deputy City Counselor

Counsel of Record
Attorneys for Respondent

City of St. Louis
314 City Hall
1200 Market Street
St. Louis, MO 63103
314-622-3361

APPENDIX

THE MISSOURI SUPREME COURT

THE CONLON GROUP *Respondent and Cross-Appellant* *v.* THE CITY OF ST. LOUIS *Appellant and Cross-Respondent*	St. Louis City Circuit Court No. 962-07977 Missouri Court of Appeals, Eastern District, No. 73789 Missouri Supreme Court No.__

APPLICATION FOR TRANSFER

This appeal should be transferred for the following reasons:

1. The opinion of the Court of Appeals is contrary to opinions in *U-Haul of Eastern Missouri, Inc. v. City of St. Louis*, 855 S.W.2d 424 (Mo.App. 1993), *Dempsey v. Boys Club of City of St. Louis*, 558 S.W.2d 262 (Mo.App. 1977), and *Lafayette Park Baptist Church v. Scott*, 553 S.W.2d 856 (Mo.App. 1977); and *Howard v. Nicholson*, 556 S.W.2d 477 (Mo.App. 1977). The former three opinions hold that there are limits to the extent to which the owner of property may be compelled to bear the cost of improving the general welfare and that governmental action which prevents the effective use of private property becomes confiscation violative of Mo.Const. Art. 1, §26. The latter opinion recognizes the doctrine of commercial frustration-under which the occurrence of an unforeseen event not under the control of either party which destroys or nearly destroys the object of a contract excuses further performance—as a component of Missouri contract law.

The parties to the present case entered into a redevelopment agreement under which The Conlon Group, Inc., was obliged to

renovate certain commercial real estate in St. Louis and was to receive consideration for the performance of its promise. The parties contemplated construction costs of $2,700,000.00. Structural problems which had not been foreseen by either party were discovered soon after redevelopment had begun, portending actual construction costs of some $30,000,000.00 and rendering performance of the contract economically impossible for the redevelopers The City of St. Louis refused to permit demolition of the buildings in lieu of rehabilitation under the contract.

The Circuit Court found that the city's refusal to permit demolition constituted a taking of private property and awarded damages under the doctrine of inverse condemnation. The Court of Appeals reversed, holding that "a redevelopment agreement is no different from any other contract" and that "[t]he doctrine of commercial frustration is inapplicable here."

2. The opinion of the Court of Appeals is contrary to opinions in *State ex rel. Chiavola v. Village of Oakwood*, 931 S.W.2d 819 (Mo.App. 1996), *Schnuck Markets, Inc. v. City of Bridgeton*, 895 S.W.2d 163 (Mo.App. 1993), and *Barket v. City of Louis*, 903 S.W.2d 269 (Mo.App. E.D. 1995). Each of those opinions holds that government action which limits the use of private property or deprives a property owner of all economically viable use of his property constitutes a taking and necessitates compensation of the property owner. The present opinion approves a city's insistence upon performance of the terms of a redevelopment agreement despite unforeseen conditions which rendered performance economically impossible and hence precluded the owner from viable use of his property.

3. This appeal should be transferred for reexamination of existing law regarding the contract doctrine of commercial frustration, the doctrine of inverse condemnation, and the intersection of those doctrines which gives rise to the following question: When an unforeseen event renders performance of a

redevelopment agreement between a government and a property owner impossible for the property owner, and the government's insistence upon performance effectively deprives the property owner of the use of his property, does the doctrine of commercial frustration apply so that insistence upon performance may constitute a taking? In this case, the trial court found that a taking had occurred and awarded damages. The Court of Appeals reversed, holding that the doctrine of commercial frustration had no application despite a tenfold increase in the cost of performance which rendered compliance economically impossible for the property owner.

Daniel P. Finney, Jr. [26389]
1015 Locust Street, Suite 820
St. Louis, Missouri 63101
Telephone: (314) 436-0600

Michael A. Gross [23600]
Cynthia A. Sciuto [43247]
15 North Gore, Suite 201
St. Louis, Missouri 63119
Telephone: (314) 918-1080

Attorneys for The Conlon Group, Inc.
Appellant

MOTION FILED

APR 19 1999

(3)

No. 98-1501

In the

Supreme Court of the United States

March Term, 1999

THE CONLON GROUP, INC., *Petitioner,*

v.

THE CITY OF ST. LOUIS, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri

MOTION OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. FOR LEAVE TO FILE AS *AMICUS CURIAE* AND BRIEF FOR THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CHARLES L. KINNEY
(Counsel of Record)
GREGORY KALER SMITH
WINSTON & STRAWN
1400 L Street, NW
Washington, DC 20005
(202) 371-5700

Counsel for Amicus Curiae

April 19, 1999

13pp

No. 98-1510

IN THE SUPREME COURT OF THE UNITED STATES

THE CONLON GROUP, INC., *Petitioner,*

v.

THE CITY OF ST. LOUIS, *Respondent.*

MOTION OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, the International Council of Shopping Centers, Inc. (ICSC) hereby respectfully moves for leave to file the attached brief as *amicus curiae* in this case in support of the petition for a writ of certiorari. The consent of the attorneys for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

1. ICSC is the trade association for the shopping center industry worldwide. ICSC's members own and/or manage nearly every shopping center in the United States. In 1998, this segment of the U.S. economy generated 51% of all nonautomotive sales, and employed 8% of total nonagricultural employment in this country. Neither party to this action is a member of ICSC.

2. ICSC seeks leave to file this brief because it is concerned about the devastating impact the decision below will have on the shopping center industry. The Missouri Court of Appeals held that merely by entering into an agreement with respondent -- pursuant to which petitioner would have to secure governmental approvals for any subsequent changes to the property -- petitioner waived its Fifth Amendment right to just compensation. ICSC members regularly enter into redevelopment agreements like the one executed in this case. Furthermore, just as with petitioner in this case, every shopping center in this country must regularly seek government permits and approvals for the development, operation and alteration of its property.

3. The decision below is troublesome to ICSC because it undermines the Fifth Amendment jurisprudence of this Court -- the constitutional assumptions upon which developers (and their lenders) rely when deciding whether or not to invest in a given project. If the decision is allowed to stand, it will cause enormous turmoil in the shopping center industry, particularly in urban areas that are being redeveloped with public/private partnerships. ICSC's role as representative of these developers makes it uniquely qualified to describe this potential impact to the Court.

Wherefore, for the foregoing reasons, ICSC respectfully asks that this motion be granted.

Respectfully submitted,

Charles L. Kinney
(Counsel of Record)
Gregory Kaler Smith
WINSTON & STRAWN
1400 L Street, NW
Washington, DC 20005
(202) 371-5700

Counsel for the International Council of Shopping Centers, Inc.

April 19, 1999

TABLE OF CONTENTS

MOTION OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* i

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES iv

BRIEF OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER 1

- Interest of *Amicus Curiae* 1
- Statement of the Case 2
- Reasons for Granting the Writ 4
- Conclusion 8

TABLE OF AUTHORITIES

Cases

Dolan v. City of Tigard, 512 U.S. 374 (1994) 5, 7

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 5

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 5

State ex rel. Washington Avenue Redevelopment Corp. v. City of St. Louis, 906 S.W.2d 808 (Mo. App. 1995) 6

Ordinances

City of St. Louis Ordinance #61366 6

Miscellaneous

Buying Power of Inner Cities Is Overlooked,
Wall St. J., June 12, 1998, at B9 4

Rachelle Garbarine, *A Shopping Center for a Neglected Ironbound Site*, N.Y. Times, Mar. 26, 1995, at N.J.R.9 5

John McCloud, *What City Hall Will Do for Retail*, Shopping Center World, April 1998, at 90 4

Anna Robaton, *Urban Retailing Renaissance Heats Up Across the Country*, Shopping Centers Today, June 1996, at 1 4

No. 98-1510

IN THE SUPREME COURT OF THE UNITED STATES

THE CONLON GROUP, INC., *Petitioner,*

v.

THE CITY OF ST. LOUIS, *Respondent.*

BRIEF OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1/]

INTEREST OF *AMICUS CURIAE*

The International Council of Shopping Centers, Inc. ("ICSC"), an Illinois not-for-profit corporation, is the trade association for the shopping center industry. ICSC has over 38,000 members worldwide and about 34,000 members in the United States. These members include owners, lenders, retailers and all others having a professional interest in the shopping center industry. ICSC members own and/or manage virtually all of the 43,600 shopping centers in the United States.

1/ Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, ICSC states that its counsel are the sole authors of this brief, and that counsel for neither party to the case authored any part hereof. Further, ICSC states that it alone has made the monetary contributions necessary to prepare and submit this brief.

In 1998, these centers generated $1,044.6 billion in retail sales, constituting 51% of all nonautomotive U.S. sales, and employed 10,351,200 individuals, constituting 8% of all nonagricultural employment in this country.

ICSC members regularly enter into the same type of redevelopment agreement that was executed in this case. Indeed, this type of development activity has become very popular in recent years, and increasingly shopping center owners -- as well as city managers -- have come to rely on it. Furthermore, just as with petitioner in this case, every shopping center in this country must regularly seek government permits and approvals for the development, operation and alteration of its property.

STATEMENT OF THE CASE[2/]

Petitioner purchased two old, vacant buildings in downtown St. Louis, Missouri from the Federal Deposit Insurance Corporation. Subsequent to the purchase, petitioner entered into a redevelopment agreement with the Land Clearance for Redevelopment Authority, an agent of respondent, pursuant to which petitioner would receive certain tax benefits in return for agreeing to use the property in a manner consistent with the agreement. An ordinance of the City of St. Louis that was incorporated by reference into the agreement required any "substantial change" to the original

---

2/ ICSC is providing this brief summary of the case for the convenience of the Court. For a more detailed statement, *see* Pet. for Cert. 3, or the decision below, *Conlon Group, Inc. v. City of St. Louis*, 980 S.W.2d 37 (Mo. Ct. App. 1998) (*reprinted at* Pet. App. 3a).

redevelopment plan (approved by the City prior to the execution of the agreement) to be submitted to the relevant organs of respondent for approval in the same manner as the original plan.

After petitioner began to implement its plan for the property, it became apparent that the buildings were structurally unsound, and that the property would not be able to be developed without first "gutting" both buildings. After considering its options, petitioner decided instead to demolish the buildings and build a new structure on the land. Consistent with its obligations under the agreement, petitioner submitted this amended plan to respondent's authorities, who approved the revised project. However, another agent of respondent, the Heritage and Urban Design Commission refused to issue a demolition permit to petitioner.

After pursuing unsuccessful administrative appeals, petitioner initiated an inverse condemnation action against respondent, alleging that denial of the demolition permit constituted a taking in violation of the United States and Missouri constitutions. Finding that there was no economically viable use for petitioner's property unless the buildings were demolished, the trial court ruled that denial of the permit effected a taking, and awarded petitioner $4,259,387 as just compensation therefor. Pet. App. 21a-22a.

The Missouri Court of Appeals reversed the judgment of the trial court, holding that petitioner waived any rights it had in the subject property when it entered into the redevelopment agreement with respondent. Pet. App. 9a-10a. Petitioner's subsequent motion for rehearing was denied by the

Court of Appeals, *see* Pet. App. 2a, and its motion for transfer was denied by the Missouri Supreme Court. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the decision below places in jeopardy the well-established constitutional guarantees of the just compensation clause of the Fifth Amendment. Rather than reiterate the cogent and persuasive legal arguments made by the Conlon Group in its petition, ICSC would like to describe for the Court the potentially disastrous effect the erroneous decision below will have on the shopping center industry. In so doing, ICSC will describe why the issue presented by this case needs to be reviewed by the Court, and why it is essential that the review occur now, with this case.

It is widely recognized as true that American cities are in desperate need of revitalization and a means for enhancing their respective tax bases. *See, e.g.*, *Buying Power of Inner Cities Is Overlooked*, Wall St. J., June 12, 1998, at B9. Perhaps more than any other industry, shopping centers have responded to this crisis. *See* John McCloud, *What City Hall Will Do for Retail*, Shopping Center World, April 1998, at 90 ("Every day, week after week, month after month, city governments throughout the United States are making deals with developers and retailers to encourage them to locate in their towns."). Urban redevelopment and public/private development partnerships are the major new thrust of the shopping center industry, *see* Anna Robaton, *Urban Retailing Renaissance Heats Up Across the Country*, Shopping Centers Today, June 1996, at 1, and the results have been dramatic. *See* McCloud, *What City Hall Will Do for Retail*, at 90-95 (detailing

successful new developments in San Mateo, CA, Syracuse, NY, Portland, OR, Reno, NV, New York, NY and Fremont, CA); *see also* Rachelle Garbarine, *A Shopping Center for a Neglected Ironbound Site*, N.Y. Times, Mar. 26, 1995, at N.J.R.9 (discussing successful new development in Newark, NJ).

Just as with the underlying facts of this case, shopping center redevelopment projects typically involve a developer who agrees to purchase blighted properties pursuant to redevelopment agreements like the one executed by petitioner. As the Court of Appeals pointed out, cities often use tax abatements to entice developers to enter into the agreement. However, even with this type of tax benefit, urban redevelopment is viewed skeptically by developers because redeveloping is more expensive and less predictable than new development. Nevertheless, significant numbers of developers have been willing to assume these risks -- and the extra costs that can follow them -- based on the assumption that they will be able to develop the land in economically beneficial ways, and with the confidence that the Fifth Amendment of the U.S. Constitution will protect against any subsequent takings of the property. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 385-91 (1994) (city may not condition grant of permit on property owner's adherence to requirements that are not related to impact of proposed development); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (land use restrictions, imposed subsequent to property owner acquiring subject property, that deny owner economically viable use of property constitute a taking); and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (regulations that mandate physical invasion of property -- no matter how minute the intrusion -- constitute a taking).

The decision below, if allowed to stand, will fundamentally change this equation. Despite the fact that the development agreement between petitioner and respondent's agent contains no language purporting to waive petitioner's Fifth Amendment rights, the Court of Appeals held that the mere fact that petitioner entered into the agreement was enough to constitute a waiver of petitioner's right to just compensation, and thereby to deny petitioner and others like it the protection of cases like *Dolan*, *Lucas* and *Loretto*: "When [petitioner] entered into the Redevelopment Agreement, it voluntarily gave up full control of its property rights." Pet. App. 9a (*citing State ex rel. Washington Ave. Redevelopment Corp. v. City of St. Louis*, 906 S.W.2d 808, 811 (Mo. App. 1995).[3/] Although the Court of Appeals placed great reliance on the fact that petitioner agreed in the agreement to submit any changes to respondent's respective authorities for approval, Pet. App. 9a-10a, this was nothing more than a codification of regulations that would have governed petitioner's activities whether they were included in the agreement or not. *See* City of St. Louis Ordinance #61366, *as amended* by Board of Aldermen on 6/9/89 (requiring anyone who seeks to demolish a structure within the City of St. Louis to obtain a permit from the City therefor).

[3/] It should be noted that the decision in *Washington Ave. Redevelopment Corp.* plainly does not support the Court of Appeals' holding. Instead, that court merely interpreted the effect of an amendment executed by parties to a development plan that explicitly reassigned certain rights and control issues. *Washington Ave. Redevelopment Corp.*, 908 S.W.2d at 810-11. The decision does not involve the Fifth Amendment in any way, and certainly does not hold that a developer forfeits its Fifth Amendment protections just by signing a redevelopment agreement.

Indeed, developers of commercial property must seek and obtain permits and approvals for all facets of their projects, including architectural and engineering design, fire safety, building code compliance, and construction/demolition. ICSC shares the concern expressed by petitioners that the decision below may motivate city attorneys to secure explicit waivers from applicants in return for these types of permits. *See* Pet. for Cert. 13. If a government can legally extort Fifth Amendment waivers from developers in return for these approvals, the protections of the Fifth Amendment are illusory. This is not consistent with this Court's jurisprudence. *See, e.g., Dolan*, 512 U.S. at 2317 ("the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."). Therefore, at a minimum, this Court should articulate the standards under which the Fifth Amendment right to just compensation may be waived.

ICSC is unaware of any other decision which holds that developers waive their Fifth Amendment rights simply by executing a redevelopment agreement. Nevertheless, in an industry that is heavily dependent on the essential guarantee of the takings clause, one case from a state appellate court will be enough to change the way the industry does business. It is true that, if the holding below stands, only the rights and investments of developers who are already parties to redevelopment agreements in Missouri -- many of them ICSC members -- will be at immediate risk. However, there can be little doubt that, prospectively, this decision will cause lenders to reconsider financing public/private partnerships, and will force shopping center developers to avoid the urban areas that

need their investments most, opting instead for undeveloped land outside of city boundaries and thereby prolonging urban blight.

CONCLUSION

For the reasons stated, *amicus curiae* ICSC requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

Charles L. Kinney
(Counsel of Record)
Gregory Kaler Smith
WINSTON & STRAWN
1400 L Street, NW
Washington, DC 20005
(202) 371-5700

Counsel for the International Council of Shopping Centers, Inc.